SERVED: April 22, 1993

NTSB Order No. EA-3856

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of April, 1993

JOSEPH DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. CRAIG FROST, Respondent.	Dockets SE-9830 SE-10053

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty issued on February 15, 1990, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator revoking all respondent's airman certificates.[2] We deny the appeal.

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]The law judge also affirmed an order of suspension against

In SE-9830, the Administrator charged respondent with violating 14 C.F.R. 91.79(a) and (d), and 91.9.[3] The order was issued in connection with a December 23, 1987 passenger-carrying helicopter flight in which respondent allegedly flew over 904 Bessie Street, Spokane, WA, at an altitude of 150-175 feet, causing horses to panic and run out of control of their handler. A 90-day suspension was sought.

In SE-10053, the Administrator charged that respondent had again, and on two separate occasions (Labor Day weekend, September 3 and 4, 1988), violated the same regulations. One incident allegedly involved low helicopter flight over the Spokane River; the other involved low helicopter flight over a recreational lake in the Spokane area. In light of these events, and respondent's apparent failure to moderate his behavior

(..continued)
respondent. See infra.

[3]§ 91.79(a) and (d) (now 91.119(a) and (d)) read:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> * * * * * *
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

§ 91.9 (now 91.13) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

despite the earlier Notice of Proposed Certificate Action (dated June 22, 1988, only 2 months prior to the Labor Day weekend events), the Administrator proposed to revoke respondent's certificates.

The law judge affirmed all the allegations, relying on eyewitness reports of each incident and rejecting respondent's testimony denying any low flight. The law judge found that respondent's credibility was seriously damaged due to false statements he had certified on two FAA applications.[4] Although both the suspension and revocation orders were affirmed, the law judge found that the suspension was subsumed in the revocation. The law judge further found that the revocation extended to all respondent's certificates, fixed wing and rotorcraft.

Respondent's arguments on appeal are extensive, and varied. We address them in the order they are raised.

1. "Does the National Transportation Safety Board's failure to provide a transcript of the hearing to the Respondent Airman's attorney until thirteen months after the hearing constitute reversible error by effecting (sic) the Respondent Airman's ability to perfect a timely appeal?"

We agree with respondent that the time taken to obtain the transcript in this proceeding was unusually and regrettably long. Nevertheless, respondent does not indicate how the delay fatally harmed preparation of his appeal, and we fail to see such

[4] See Tr. at 345, 461-462, and Exhibit C-8. On an April 4, 1981 application, respondent certified to 150 total hours and 125 pilot-in-command hours in a FH 1100 helicopter; on June 29, 1981 (only 2 months later), he certified to 635 total hours and 825 pilot-in-command hours.

evidence of harm as to warrant dismissal.[5] Briefing dates were extended until more than 1 month after receipt of the transcript. And, even assuming for purposes of argument that Board violation of its own rules would warrant dismissal, there is no Board rule that was violated in this case. That we were unable to meet an informal standard we set for ourselves for the convenience of the parties is not a reason to dismiss these complaints.[6]

2. "Does the misconduct of an FAA official in discussing and/or the possible coaching of witnesses while excluded from a hearing by the Judge, constitute reversible error?"

Respondent contends that, unknown to the law judge or respondent's attorney, the FAA inspector in these cases, witness Purtill, was talking to other witnesses about the case and coaching them, all while the witnesses were sequestered and apparently after Mr. Purtill had testified. Respondent attaches four affidavits from individuals called to testify on his behalf. Mr. Purtill is accused by two witnesses of reviewing the facts of the three incidents with persons who later testified at the hearing. The other two individuals apparently did not hear the content of the conversations.

We are greatly concerned about these allegations, because if they are true they could compromise the integrity of our process

[5]Respondent does not seek less drastic relief, such as a new hearing.

[6]Respondent alleges that the transcript was late because the Board did not pay the court reporter. In fact, it was the Board's contractor that failed to pay a subcontractor. To obtain the transcript, the Board intervened and paid the subcontractor directly.

and the rights of respondents to a fair hearing. We, therefore, urge the Administrator to investigate the matter -- something he gives no indication that he has done or intends to do.[7] Despite the seriousness of these claims, however, we ultimately conclude that dismissal is not warranted because the law judge's decision is well grounded in overwhelming testimony from independent, experienced, helicopter pilot witnesses who did not know each other and had no apparent bias against respondent or reason to favor the FAA.[8]

3. "Does the FAA's misconduct in preparing statements and having witnesses sign those statements as their own, constitute reversible error?"

It developed at the hearing that Mr. Purtill had drafted statements for those individuals who were passengers on his boat during the Spokane River incident.[9] Respondent contends that this is improper conduct, that it violates the Department of Transportation (DOT) Compliance and Enforcement Manual, and that it denied him a fair hearing.

Although this matter raises further question about Mr.

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[7]It may be that Mr. Purtill was not advised and did not know not to discuss the merits of the cases with the other witnesses. There is no instruction to them on this matter in the transcript.

[8]See also Administrator v. Rivers, NTSB Order EA-3787 (1993), which reflects timeliness concerns also relevant here. Respondent does not explain why he waited so long to bring these alleged improprieties to our attention.

[9]According to Mr. Purtill, he sent the statements to the passengers (there were at least four people in the boat with him) for review. The only statements in the record are those of Mr. Purtill and a Mr. Shields, one of the passengers.

Purtill's conduct, we are not convinced that the language in the manual need be read as strictly as respondent would have it. Moreover, although the basic facts of the two statements are the same, the entirety of the statements are far from identical. But, even were we to have found that respondent was prejudiced by Mr. Purtill's actions, dismissal would not be the appropriate remedy. It is much more likely that we would strike Mr. Shields' statement (Exhibit R-2) as unreliable. Doing so would have no effect in this case, as he appeared at the hearing to be examined regarding his recollection of the events (as did other passengers on the boat). The law judge had a full opportunity to weigh the relative credibility of all the witnesses, including Mr. Purtill and Mr. Shields. The law judge found Mr. Shields' testimony unreliable.[10]

4. "Did the Administrative Law Judge abuse his discretion by revoking those certificates and ratings that were acquired after the incident and not a part of the pleadings?"

Respondent cites Administrator v. Harrington, 1 NTSB 1042 (1971), where we declined to suspend an airline transport pilot (ATP) certificate, finding sufficient the suspension of a respondent's type rating. Harrington, however, is inapposite. We there found that the evidence did not raise such doubts about the respondent's overall piloting skills as to warrant suspension

[10]We are also aware of respondent's implicit charge that Mr. Purtill changed Mr. Shields' statement. (Allegedly, Mr. Shields changed the altitude written in the draft statement from 30 feet to 80-90 feet. Tr. at 111.) The law judge was unconvinced that Mr. Shields remembered correctly, and respondent offers nothing on appeal to demonstrate that the law judge's credibility finding should be overturned.

of his ATP. In the case before us, respondent's actions raise questions about respondent's good judgment and care, non-technical aspects of his qualifications, and these questions are so serious that a broader remedy is not inappropriate.

Moreover, that the Administrator may seek to revoke certificates or ratings earned after his order is issued is a necessary enforcement power. The alternative -- that a pilot could have his commercial pilot certificate suspended or revoked but still be permitted to operate under a more recent ATP -- is an absurd result, contrary to basic notions of aviation safety. See Administrator v. Reno, NTSB Order EA-3622 (1992) at footnote 9.[11]

5. "Does the Administrative Law Judges' (sic) refusal to allow the testimony of witnesses called to testify to the Respondent's reputation, skill, ability and judgement, constitute reversible error?"[12]

Respondent argues that Administrator v. Reynolds, 4 NTSB 240 (1982), requires consideration of so-called reputation evidence. We disagree. In Reynolds, we held that, to find a section 91.9 helicopter violation based on potential harm, the evidence must demonstrate that the likelihood of harm was unacceptably high or that the pilot's exercise of judgment was clearly deficient. In referring to the pilot's judgment, we were discussing judgment in

[11]The Administrator indicates (Reply at 29) his intent to move to amend the complaint to update the reference to include respondent's current certificates. Such a motion was not filed and was not necessary.

[12]The transcript only indicates the offer of one such witness. See Tr. at 226.

undertaking and conducting the particular operation, not past judgment or character.

Moreover, we agree with the Administrator that Reynolds, which found only a § 91.9 violation, applies only where no underlying operational violation has been found. Where there is an underlying operational violation of another regulation (such as here), a § 91.9 finding stands as a residual, derivative violation, needing no separate proof of harm, actual or potential. See, e.g., Administrator v. Pritchett, NTSB Order EA-3271 (1991) at n. 17, and cases cited there.[13]

6. "Does the fact that there was no testimony as to the Airman's ability to operate a fixed wing aircraft indicate an abuse of discretion in revoking the fixed wing ratings for both single and multi engine and the Lear Jet type ratings in addition to his helicopter license?"

Whether revocation is appropriate depends on whether the Administrator has demonstrated that respondent lacks qualification to exercise his certificate(s). This is an extremely fact-bound inquiry, and in this case there was more than sufficient evidence for the law judge to conclude that respondent lacked qualification to hold any airman certificate. Findings that respondent repeatedly flew unnecessarily and dangerously low over boaters and swimmers, with no apparent regard for the limitations of his aircraft in the circumstances in which he had placed it (see infra), and did so after he had received a notice threatening suspension of his certificate for

[13]Even were we to apply Reynolds, the Administrator offered substantial evidence to prove either prong of the Reynolds test.

the exact same violations, do not reflect the level of the care and judgement expected from airmen at any level. Administrator v. Wingo, 4 NTSB 1304 (1984) (lack of qualification can be shown in two ways: a continuing pattern of conduct showing disregard for regulations or lack of compliance disposition; or conduct during one event that is sufficiently egregious to demonstrate lack of qualification).

7. "Did the Administrative Law Judge apply an erroneous and improper standard for the determination of a violation of the FAR's?"[14]

8. "Was the Administrative Law Judge's finding of a violation of the FAR's against the weight of the evidence?"

We find no fault in the initial decision's legal or factual analysis.

Respondent is correct that there are no numeric minimum altitudes specified in the regulation for helicopter flight, and that Reynolds, as well as other cases, see, e.g., Administrator v. Palmer, 1 NTSB 504 (1969), offer helicopter pilots considerable leeway. Nevertheless, certain standards do apply. Section 91.79(a) contains a measurable standard.

In discussing § 91.79 in Palmer, we stated:

> While the Board recognizes that a helicopter is capable of hovering or moving at a slow rate of speed and can effectuate a landing in a very small area, and the safety regulation here involved recognizes this fact of the helicopter's operation, the aircraft nonetheless had certain operating characteristics which create safety hazards. Thus, where there is a power failure, the aircraft, unless it possesses a sufficient altitude, will immediately plummet if it has been in a hovering position, and in the situation

[14]Federal Aviation Regulations.

> here involved, would not land at any safe place but would land in the river bed and be subjected to severe stress on impact with substantial damage to the aircraft and a serious hazard to the well-being of respondent and his passengers.

Id. at 505. The facts before us warrant the same conclusions, as the law judge found little opportunity at the river or lake for landing elsewhere but in the water.[15] At the height at which respondent was found to have been flying (and the law judge's findings on this matter are based on credibility assessments that we have no grounds to overturn), respondent could not have made an emergency landing without undue hazard to persons and property on the surface.[16] The record establishes that a water landing would have been dangerous to boaters and swimmers, as well as to respondent's passenger(s).[17] The record further supports a conclusion that the landings that were accomplished were potentially dangerous (and not too remotely dangerous) to people on the ground, as the landings were not supervised and, in at least one instance, there were children in the area. Regardless of respondent's abilities as a pilot, operating at the low altitudes found by the law judge violated the operational

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[15]There is no argument that the exception of § 91.79, that the low flight is necessary to takeoff or landing, was relevant in any of the three incidents.

[16]Similar credibility analysis offers no basis to overrule the law judge's findings regarding the hazards to persons on the river and lake. See Tr. at 267-268.

[17]Respondent's witness, Mr. Miller, only testified that, at 100 feet, a safe autorotational landing could have been made. He did not, however, disagree with the difficulties of a water landing without pontoons and without life jackets.

parameters of the height/velocity curve.[18] And, in the third incident, the testimony established that respondent's low flight spooked Richard Wilson's horses, causing him physical harm.[19]

The law judge did not create any new standards. In his discussion of respondent's unsecured landing sites at Loon Lake, he was considering potential danger in respondent's actions -- obviously a legitimate part of the § 91.9 and 91.79 analyses.[20]

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[18] E.g., Tr. at 57, 71.

[19] Respondent's actions at Bessie Street also were hazardous because the geography of the area was such that an emergency landing site might not have been immediately available. See Administrator v. Harrington, NTSB Order EA-3767 (1993) at 8-9. The incident at Loon Lake was found to violate § 91.79 not so much because the landing site was too small but because the helicopter's comings and goings were at altitudes that threatened the safety of those on the ground and in the aircraft had a power failure occurred.

[20] See Reynolds, supra at footnote 5, for example.